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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1644

LLOYD F. and ELOISE L. CANFIELD,

Petitioners,

-against-

THE CITY OF NEW YORK,

Respondent.

BRIEF OPPOSING PETITION FOR A WRIT OF CERTIORARI

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May 15, 1980

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RESPONDENT'S BRIEF IN OPPOSITION

Jurisdiction

The judgment of the Court of Appeals (Second Circuit) was entered September 27, 1979 and a petition for rehearing suggesting rehearing en banc was denied January 23, 1980 (1d, 1e, 3e).* Petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

*Numerals in parentheses followed by small letters (i.e., 1d) refer to pages of Petitioners' Appendix.

Questions Presented

1. Where this Court, in a dispute between States over the waters of an interstate river, equitably apportions to the upstream State (New York) a share of the flow from its tributaries thereto, subject to costly terms and conditions for water purification and releases to provide the downstream States a vastly increased and dependable year-round flow, may riparians in those downstream States claim the right to the full natural flow of the river as though such apportionment had never been made?

2. Where riparians in a downstream State claim that the release regime urged by their State and embodied in a decree

of this Court is injurious to their property, did the Court of Appeals properly hold that they must look to their State for revision thereof either by modification of this Court's decree or by action of the Basin States through their compact?

3. Where New York requires the City of New York to compensate New York riparians only for using the entire share of the flow thus apportioned to that State by this Court, are riparians in the downstream States thereby denied equal protection of New York's laws?

Statement of the Case

(1)

The Delaware River is a 410-mile interstate stream originating in the Catskill Mountains of New York wherein the East and West Branches of the River are located. In

1929 New Jersey commenced an original action in this Court to enjoin New York from proceeding with a planned diversion to the City of New York (hereafter City) of 600 million gallons daily (mgd) from New York's East Branch and four other New York tributaries (Neversink, Willowemoc, Little Delaware, Beaver Kill) to the Delaware.

A Special Master was appointed. Pennsylvania intervened, opposing application of the common-law rule of riparian rights to the Delaware "since that proposition threatened the right of Philadelphia and Eastern Pennsylvania to continue their use and development of the Delaware River." New Jersey v. New York, 345 U.S. 369, 374 (1953). It urged application of the doctrine of equitable apportionment, and that New York be required to impound the surplus waters of winter and spring so as to provide

Philadelphia, Trenton and the lower Delaware with a compensating flow during the dry (summer and fall) season - Pennsylvania stating that its interests would be protected "if the water is taken pursuant to the Pennsylvania plan of impounding and release" (City App., pp. 4-5).*

The "prayer of the Pennsylvania intervention for the application of the doctrine of equitable apportionment" was approved by the Special Master and granted by this Court (ibid., pp. 7, 8-10). His report, confirmed by this Court, found that "any possible claim which could be made under the Fourteenth Amendment is eliminated by the modification

*The position of each State in the proceedings before this Court, the Special Master's reports therein, the decisions of this Court, the terms of its Decrees, as well as of the Compact subsequently adopted by the Delaware River Basin States in 1961, are more fully detailed in the City's Appendix submitted herewith.

herein made of the New York plan of diversion" - New York being enjoined from diverting more than 440 mgd (from its East Branch and Neversink River). New York was also required to construct a sewage treatment plant at Port Jervis, N.Y. (Tri-State Rock where N.Y., Pa. and N.J. converge) to purify the flow downstream, and to provide reservoirs sufficient to impound surplus waters of Spring for releases to maintain the "summer river" at a constant flow of 998 mgd at Port Jervis, or triple the lowest stage (322 mgd) previously recorded (ibid., pp. 6-10).

(2)

In 1951, New York applied to this Court for an equitable apportionment of 360 mgd from its West Branch for City use, i.e., a total of 800 mgd. This

time New Jersey supported the requested equitable apportionment of flow from the West Branch on condition that a more favorable release regime (Montague formula) be adopted to increase the constant flow at Montague, N.J. (2 miles from Port Jervis), and that New Jersey be apportioned 100 mgd without compensating releases (City App., pp. 13-15).

Upon agreement between New Jersey and Pennsylvania for construction of a reservoir at Wallpack Bend (between those two States) to impound 756 mgd of Delaware River water for their joint use, and subject to adoption of the Montague formula, Pennsylvania agreed, as well. A consent decree was entered by this Court in 1954 on recommendation of its Special Master, Delaware being also a party thereto (ibid., pp. 17-23). As was stated by Pennsylvania

in its brief - "Pennsylvania concedes that no present injury will be done to it if New York City builds the Cannonsville Reservoir (on the West Branch), diverts 800 mgd, and releases water according to the Montague formula" (Pa. br. to SM, pp. 31, 20-21; SM Report, pp. 24-26).

In addition to erecting a sewage treatment plant at Port Jervis, the 1954 consent decree required the City to build reservoirs sufficient to provide, in accordance with the Montague formula, a permanent constant flow of 1,131 mgd at Montague, plus supplemental releases (based on surplus waters from its entire Croton, Catskill and Delaware systems) sufficient to raise that flow to 1,722 mgd (City App., pp. 20-23). As New Jersey acknowledged - "[t]he beneficial effects of improved river regulation and of the supplementary releases on potable water

supply, sanitation, fish life, and recreation for the whole length of the river below the New York City dams provides adequate compensation for any losses which the State of New Jersey may suffer due to increased diversion of Delaware River water by New York City," and that the City would be subjected to enormous costs to provide the compensating flow thus assured the lower States (City App., pp. 16-17; Record before this Court in 1952 proceeding [Ex. AZ herein], pp. 1072-3, 1057).

The 1954 consent decree (347 U.S. 941, 995) enjoined New York from diverting more than 800 mgd from its tributaries; required storage capacity for "compensating releases" pursuant to the Montague formula, and a water purification plant; apportioned New Jersey 100 mgd from its tributaries to the Delaware without compensating releases;

and appointed a River Master to assure compliance with the release regime (City App., pp. 20-23).

(3)

In December of 1971 petitioners, as owners of land in Pennsylvania (Wayne County) on the upper Delaware, commenced a class action against the City in the Southern District of New York on behalf of all similar property owners in the downstream States "numbering in the thousands."* They sought damages on the ground that the share of the flow from New York's tributaries, apportioned that State by this

*While class action status was denied on authority of Zahn v. Internatl. Paper Co., 414 U.S. 291, 302 (1974), the Court conducted a joint trial with 4 other Pennsylvania riparians (Elwood, Lake, Badgley, Gregory), on whose behalf a companion petition has been filed with this Court for a writ of certiorari. The City's brief herein responds to both petitions.

Court, was a taking of their property therein, and that they were also damaged by the release regime adopted in behalf of the downstream States. As stated by petitioners Elwood, et al - "the release scheme devised and found to be applicable by this Court is not specific. Rather, said scheme is general," and inadequate for the upper Delaware (Elwood pet., p. 30).

Opinions Below

a. District Court. The District Court held that "the rights of the individual plaintiffs could not have been advanced by Pennsylvania" in New Jersey v. New York, 283 U.S. 336 (1931), 347 U.S. 995 (1954). Consequently, as to them, the authorized "diversions of such enormous quantities of water from the River and out of the Delaware watershed is unreasonable" (26a-27a; 73a-74a, 69a).

In any case, and even if plaintiffs were not entitled to the share of the flow apportioned to New York, the release regime adopted by this Court to benefit the lower Delaware was found to have worsened the flow in the upper Delaware, the flow past plaintiffs' property being "not directly assured by the provisions of the Decree and of the Compact" (81a, 38a; 41a; 94a-95a). Plaintiffs were then held entitled to the "full natural flow of the Delaware River" free of "thermal pollution" due to variations in water temperature caused by releases; and despite the program newly commenced by the DRBC to adjust those releases to remedy any adverse effect upon the upper Delaware, the Court predicted that "massive fluctuations in temperature, flow and velocity produced by the City's meeting the Montague formula would still occur"

(41a; 45a-49a; 102a-104a). The diversion and/or releases being "tantamount to condemnation," total damages of $336,303, plus post-judgment interest and costs were awarded the 5 Pennsylvania riparians (126a; 125a-137a).

[N.B. As noted by the District Court (45a), in 1976 New York sought to regulate releases from 30 reservoirs in 7 of its counties "to protect and enhance the recreational use of water affected by such releases" (L. 1976, cc. 888, 889; N.Y. Env. Conserv. Law, §§15-0801[1], 15-0805 [2]). This Court requested memoranda from the parties to the amended decree as to the impact thereof upon the Montague formula (45a). While Pennsylvania insisted that "[m]aintenance of the Montague Formula flows is vital for the protection of down-

stream municipal, industrial, recreational, fishery and other uses. It is not simply a legal requirement, but a physical necessity" to assure water supplies to southeastern Pennsylvania and prevent saline intrusion - it stated that the proper tribunal was the DRBC (23c; Pa. Mem., pp. 6, 12-14). When this Court advised the River Master that it would take no action, the DRBC promulgated a release program (45a-46a). The DRBC's annual reports for 1977 (pp. 6-7) and 1978 (p. 12), state that "through increased and more equal distribution of releases, more gradual stream fluctuations, and special extra releases to protest aquatic life," its release program to improve the upper Delaware had "exceeded expectations" and would be continued.]

b. Court of Appeals. Reviewing the two prior proceedings before this Court culminating in the 1954 consent decree, the Court of Appeals held that the terms thereof are "conclusive upon all Pennsylvania citizens and bind their rights" (10c; 5c-9c). The Court pointed out that Pennsylvania could neither grant to its citizens, nor recognize, any rights in the flow of interstate waters greater than Pennsylvania's own share therein - "'and its share was only an equitable portion thereof'" (14c-15c; 10c-12c). Hence, the diminished flow resulting from an equitable apportionment by this Court of an interstate stream created no "actionable wrong" (16c).

As to damages for releases pursuant to the Montague formula, the Court noted that New York's release regime would have

primarily protected the upper Delaware; but that Pennsylvania's release plan and the Montague formula ultimately adopted, reflected Pennsylvania's primary concern with the "industrial and water supply needs of Philadelphia and southeastern Pennsylvania" (20c-22c). As a result, said the Court, "Pennsylvania was indeed successful in demanding and securing for its citizens costly compensating benefits," and that policy decision "for a greater stabilization of downstream river conditions" may not be collaterally attacked by Pennsylvania water claimants in a suit against the City (23c-24c). Pointing out that the City had fully complied with the Montague formula, the opinion states that any inadequacies therein must be remedied by Pennsylvania upon application to the Supreme Court or through its compact (26c,

28c). The Court concluded that - "Appellees cannot recover from New York City for what their own sovereign has ceded in their behalf. Their rights of recovery, if any, lie against Pennsylvania" (24c).

POINT I

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED CONCERNING ANY TAKING FROM PENNSYLVANIA CITIZENS OF THE FLOW OF NEW YORK'S WATERS APPORTIONED THAT STATE BY THIS COURT.

(1)

The law with respect to rights of a State and its citizens in the flow of interstate waters has been firmly settled by this Court. The contention of an upstream State "that she could dispose of all the water within her borders, and owed no obligation to pass any of them" to a downstream State was flatly rejected, as was that of the lower State "that she was

entitled to have the stream flow as it flowed in a state of nature" - "the lower State is not entitled to have the stream flow as it would in nature regardless of need or use." Colorado v. Kansas, 320 U.S. 383, 385, 393 (1943); see Connecticut v. Massachusetts, 282 U.S. 660, 669-670 (1931); Hinderlider v. La Plata, 304 U.S. 92, 101-103 (1938).*

Such conflicts between the States over the flow of their interstate waters have been resolved with due regard to their sovereignty. "International law is no alien in this tribunal.* * * Sitting

*It was again stated in New Jersey v. New York, 283 U.S. 336, 343 (1931), that although New York has the power to cut off all the water within its jurisdiction, "the exercise of such a power to the destruction of the interest of lower States could not be tolerated. And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the River might come down to it undiminished."

as it were, as an international, as well as a domestic tribunal, we apply Federal law, state law and international law, as the exigencies of the particular case may demand." Kansas v. Colorado, 206 U.S. 46, 96-98 (1907). Pursuant thereto, "[t]he measure of the reciprocal rights and obligations of the States was declared to be an equitable apportionment of the benefits of the river." Colorado v. Kansas, 320 U.S. 383, 385 (1942).*

*"The doctrine of equitable apportionment is a method of resolving water disputes between States. It was created by this Court in the exercise of its original jurisdiction over controversies in which States are parties." Arizona v. California, 373 U.S. 546, 597 (1963). "Rights in interstate streams, like questions of boundaries, 'have been recognized as presenting federal questions' (Hinderlider v. La Plata Co., 304 U.S. 92, 110. The question of apportionment of interstate waters is a question of 'federal common-law' upon which state statutes or decisions are not conclusive." Illinois v. City of Milwaukee, 406 U.S. 91, 105 (1972); see Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 426-7 (1964); Arizona v. California, 373 U.S. 546, 564, 597 (1973).

That rule applies regardless of the fact that "different traditions and practices prevailing in different parts of the country may lead to varying results," since "the effort always is to secure an equitable apportionment without quibbling over formulas." New Jersey v. New York, 283 N.Y. 336, 343 (1931). The law applied by a particular State to its own waters being subject to change by that State in accordance with its own policies, is not controlling in resolving disputes between States over their interstate waters. Connecticut v. Massachusetts, 282 U.S. 660, 670-1 (1931); cf. State v. Knapp, 207 P. 2d 410, 447 (1949), 167 Kan. 546; Baumann v. Smrha, 145 F. Supp. 617, 624-5 (D.C. Kan., 1956).

When the flow of an interstate stream is thus apportioned by this Court, water claimants in a lower State are bound

by the allocation to the upstream State. And such apportionment by this Court does not require that State to appropriate, take or seize the share apportioned it, but defines and limits the rights to the flow of each State and its citizens, who "were represented by their respective States and are bound by the decree." Wyoming v. Colorado, 286 U.S. 495, 506-9 (1932); see United States v. Nevada, 412 U.S. 534, 539 (1973); Nebraska v. Wyoming, 325 U.S. 589, 615-616, 627 (1945), 295 U.S. 40, 43 (1934); New Jersey v. New York, 345 U.S. 369, 372-3 (1953); Hinderlider v. La Plata Co., 304 U.S. 92, 106, 107 (1938); City of Tacoma v. Taxpayers, 357 U.S. 320, 340-1 (1958). Thus, when Kansas riparians sued water claimants in Colorado for "taking" the flow of interstate waters previously determined to be within Colorado's equitable share thereof, this Court enjoined

all such actions. Colorado v. Kansas, 320 U.S. 383, 388-390 (1942); see, Wyoming v. Colorado, 259 U.S. 419, 464 (1922). In short, the law of a particular State - whether by its Constitution, statutes or decisions - cannot confer upon its citizens rights in interstate waters in excess of that State's share, "and its share was only an equitable portion thereof." Hinderlider v. La Plata Co., 304 U.S. 92, 94, 102 (1938); cf. La Plata River & Ditch Co. v. Hinderlider, 25 P. 2d 187, 188-9, 191 (1933).

(2)

As this Court long ago held, where a State accepts the common-law rule of riparian rights pursuant to which impoundments and appropriate releases by an upstream riparian are recognized, "she cannot complain if the same rule is administered between herself and a sister State." Kansas v. Colorado, 206

U.S. 46, 104-5 (1907).*

In effecting "an equitable apportionment of the benefits" of the Delaware River to achieve that "delicate adjustment of interests which must be made" (Nebraska v. Wyoming, 325 U.S. 589, 618, 627 [1945]), this Court apportioned New York 800 mgd from the surplus or flood stages of its own tributaries on condition that a reservoir capacity of sufficient size (269 billion gallons [BG]) be created to store heavy Spring runoffs for basic permanent releases of 85 BG (32% of capacity) during the dry season, plus 70 BG (26% of capacity) for supplemental releases (City App., pp. 17-20).

*That a State adhering to the common-law rule of riparian rights will determine reasonable use of an intra-state stream and condition such use on the upstream riparian's creating sufficient reservoir capacity for releases "in time of scarcity," and purification of the waters so released, see Strobel v. Kerr Salt Co., 164 N.Y. 303, 320-1 (1900).

Apart from the beneficial impact upon flood control of such huge reservoirs, the compensating releases thus required pursuant to the Montague formula had the far more beneficial effect of assuring the lower States a dependable water supply for their major cities (Philadelphia, Camden, Trenton) during the summer and fall when subsidence of the river's natural flow not only reduces their available water supplies but due to inflow of ocean salinity, threatens complete destruction thereof - as Pennsylvania but recently reminded this Court (ante, pp. 13-14). In addition, New York was required to purify the waters for the lower States by constructing a sewage treatment plant at Port Jervis (ante, p. 8). Pennsylvania and New Jersey (which was apportioned 100 mgd without providing any compensating flow)

both expressed their satisfaction with the equitable apportionment of the river's benefits effected by this Court (ante, pp. 8-9). And the enormous cost to the City of providing such compensating benefits to the lower States in compliance with "the conditions and obligations" imposed by the amended decree, was fully recognized by them, as well (ibid.).

(3)

In seeking certiorari to review the decision of the Court of Appeals holding Pennsylvania water claimants bound by this Court's equitable apportionment of the flow of New York's tributaries to the Delaware, petitioners rely upon a number of fallacious propositions. It is first said, for example, that - "This Court has not explicitly ruled on the right of riparian owners to claim

compensation for property damages caused by diversions authorized by equitable apportionment decrees" (Pet., p. 9). Petitioners simply ignore the fact that such actions by Kansas riparians against citizens of Colorado for diversions held within Colorado's equitable share of interstate waters were enjoined in Colorado v. Kansas, 320 U.S. 383, 388-391 (1942).

Similarly fallacious is their contention that Pennsylvania was barred by the parens patriae doctrine and the Eleventh Amendment "from representing individual riparian damage claims" (Pet., p. 9). As this Court pointed out in New Jersey v. New York, 345 U.S. 369, 372 (1953), the parens patriae rule not only serves to protect citizens, barred by the Eleventh Amendment from suing a sister State, but "has aspects which go beyond mere restate-

ment of the Eleventh Amendment; it is recognition of the principle that the State, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" And this, because it was Pennsylvania's obligation, and not that of this Court, "to evaluate all the separate interests within Pennsylvania" in formulating its policy, and no citizen of Pennsylvania could challenge any apportionment of interstate waters to a sister State there adjudicated - "Otherwise a state might be judicially impeached on matters of policy by its own subjects" (345 U.S. at p. 373).*

*"For the purpose of dividing the waters of an interstate stream with another State, Nevada has the right, parens patriae, to represent all the non-federal users in its State insofar as the share allocated to the other State is concerned." United States v. Nevada, 412 U.S. 534, 539 (1973). See cases cited ante, p. 21.

It is next contended that petitioners "have vested property rights in the natural flow of the entire River," so that any diminution thereof through "the device of equitable apportionment permits the destruction of individual riparian property without just compensation" (Pet., pp. 9, 10-11). Petitioners are said to have vested rights in the natural flow of the Delaware which "an equitable apportionment decree cannot defeat" (Pet., p. 12). And this, because those rights were not dependent on Pennsylvania law, but "were derived from the Crown and vested in individual landowners during the colonial period" (Pet., p. 12).*

*Thus, the holding in Hinderlider v. La Plata Co., 304 U.S. 92, 106 (1938) that - "whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens

(footnote cont'd. on next page)

We put aside the self-evident fact that in equitably apportioning the benefits of the Delaware by allowing New York a share of its own headwaters thereof, compensation on a grand scale was required - the obligation to provide reservoir capacity for compensating releases to benefit the lower States, as well as a purification plant. Petitioners' position that riparian rights in inter-colonial waters were "unaffected by territorial boundaries"; included a "distinct property right in the natural flow" thereof independent of public

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* (footnote cont'd. from previous page)

of each State and all water claimants, even where the State had granted the water rights" prior thereto - is distinguished on the ground that "in western states (unlike the thirteen colonial states) the rights of riparians may be no greater than the rights granted to them by their respective states" (Pet., p. 13).

rights in those waters; and that such vested private rights to the natural flow were unaffected by the Revolution, i.e., "the transfer of territory by the Crown did not affect vested private property rights" (Pet., pp. 12-13, 14) - rests upon several misconceptions and distortions of law.

While divine inheritance may have rendered the natural flow of inter-colonial waters the private property of the king and his grantees, when the colonies declared their independence as sovereign States, they could neither accord nor recognize greater rights in common or interstate waters than they were entitled to - "the title of a state is sovereignty, full and absolute dominion; 2 Peters 300, 301; the title of an individual such as the state makes it by its grant and law." Rhode Island v. Massachusetts, 12 Pet. (37 U.S.) 657, 734

(1838). And while the sovereignty declared by the original States enabled each of them to fashion its own laws with respect to common or interstate waters, such laws could not extend beyond that State's share thereof. As stated in Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212, 229 (1845) - "But her rights of sovereignty and jurisdiction are not governed by the common-law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. In the case of Martin and others v. Waddell, 16 Peters 410, the present chief justice in delivering the opinion of the court, said: 'When the Revolution took place, the people of each state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, sub-

ject only to the rights since surrendered by the Constitution." See, St. Clair v. Lovington, 23 Wall. 46, 64, 68 (1874).*

Petitioners insist, nevertheless, that each of the 13 colonies, upon proclaiming its independence and sovereignty and subsequently effecting a peace treaty in

*"In Delaware, as has been declared by its Supreme Court 'all navigable rivers within the State belong to the State, not merely in right of eminent domain, but in actual propriety.'" Shively v. Bowlby, 152 U.S. 1, 23 (1894). And as Pennsylvania advised this Court in New Jersey v. New York, 283 U.S. 336 (1931) [Pa. br., p. 32] - "Pennsylvania has never applied the rule of common-law riparian rights to its large interstate rivers such as the Delaware and Susquehanna. The local law respecting these interstate waters has followed the civil law," so that they are public waters, precluding compensation for any public use thereof unless expressly authorized by statute. See Rundle v. Del. and Raritan Canal Co., 55 U.S. 80, 91, 94 (1852); Carson v. Blazer, 2 Binney 475, 4 Am Dec. 463; Water Power Co. v. Water Comrs., 168 U.S. 349, 371-3 (1898); Shively v. Bowlby, 152 U.S. 31-32, 46 (1894); cf. City of Philadelphia v. Commonwealth, 130A. 491, 493-4 (1925).

recognition thereof, was obliged by international law to protect "vested private property rights" in the natural flow of inter-colonial waters, so as to preserve such rights in behalf of citizens of the other States. They thus cite Knight v. U.S. Land Association, 142 U.S. 161, 183-4 (1891) for the proposition that "the transfer of territory by the Crown would not affect vested private property rights" (Pet., p. 14). In that case, which involved "conquest from Mexico in 1846," the United States was held bound by treaty and international law "to protect all rights of that territory emanating from the Mexican government" - so that upon admission of California to statehood, it could not claim the right to tidelands previously conveyed by Mexico to the pueblo of

San Francisco and which was "claimed by the city of San Francisco as successor of the Mexican pueblo of that name" (142 U.S. at pp. 184-4).

Petitioners' "analogy" fails to recognize that in the peace treaty of 1783 following the Revolutionary War, the king acknowledged each of the 13 original States as "free, sovereign and independent States; that he treats with them as such; and for himself, his heirs and successors relinquishes all claims to the government, proprietary and territorial rights of the same" (8 Stat. 54-55, 80-81). The territories of those States were not annexed by conquering States to their own domains; nor was there any grant or cession to them of their own territories, previously declared free, sovereign and independent of the "ceding" power. And the crown could neither grant

nor cede to any of them rights in the territories of another State. Nor could it oblige any of those States to recognize a prior proprietary grant, to its former subjects in another colony, of the full natural flow of that State's own waters preemptive of the right of every sovereign State to an equitable share thereof. And there is no rule of international law requiring even a conquering State to recognize any such preemptive grant in its own waters, previously made by the vanquished nation, to subjects in territories ceded by the latter to that conquering State.*

*Even where a State acquires territory by "cession," it is "subject to the constitution and laws of its own government and not according to those of the government ceding it." Pollard's Lessee v. Hagan, 3 How. (44 U.S.) 212, 225 (1845); Coffee

(footnote cont'd. on next page)

In short, none of the 13 original States was obliged by treaty or international law to recognize any proprietary grant preemptive of its own right to an equitable share of its interstate waters. The Constitution adopted in 1787 limited every State to settling its claims to the flow of waters from another State by compact approved by Congress, or by decree of this Court. Kansas v. Colorado, 206 U.S. 46, 97-98 (1907); Hinderlider v. La Plata Co., 304 U.S. 92, 104-6 (1938). When obliged to resolve such claims, this Court took full cognizance of and applied rules of international law. It recognized the limits of each State's power over the

* (footnote cont'd. from previous page)

v. Groover, 123 U.S. 1, 10-11 (1887); see cases cited, ante, p. 32, showing that Pennsylvania itself recognized no such proprietary right, even of its own citizens, in its own share of the Delaware.

flow of interstate waters, and that no State could grant or enforce "rights" therein in excess of that State's share of such waters - "and its share was only an equitable portion thereof." Hinderlider v. La Plata Co., 304 U.S. 92, 102 (1938); New Jersey v. New York, 283 U.S. 336, 342-3 (1931). The title of a private water claimant being "such as the state makes it by its grant and law" (Rhode Island v. Massachusetts, 12 Pet. [37 U.S.] 657, 734 [1838]) - all such claimants are necessarily "represented by their respective States and are bound by the decree" entered by this Court in a proceeding resolving such disputes among States over their rights to the flow of interstate waters by an equitable apportionment thereof. Wyoming v. Colorado, 286 U.S. 494, 508-9 (1932); New Jersey v. New York, 345 U.S. 369, 372-3 (1953).

Thus, the conditions and obligations imposed upon New York for its share of its own tributaries to the Delaware, via a purification plant and sufficient reservoir capacity to provide a compensating flow far greater than the natural flow of the "summer river" to benefit the lower States and assure their cities a dependable water supply, are binding upon petitioners and they are not entitled to more.*

*In stating that the Court of Appeals "declined to follow its own decision" in Pine v. City of N.Y., 112 Fed. 98 (2d Cir., 1901), petitioners fail to recognize that New York had there unilaterally diverted interstate waters (Pet., pp. 14, 15). While this Court reversed the injunction against New York to permit it to settle claims for which it "is legally responsible, a proposition upon which we express no opinion" (185 U.S. 93, 107-8 [1902]), on that same day it also decided to take proof as to the share of interstate waters to which each State was entitled in Kansas v. Colorado, 185 U.S. 125, 146-7 (1902). And 5 years later, the rule of equitable apportionment was first applied

(footnote cont'd. on next page)

(4)

Petitioners next baselessly contend that the decision of the Court of Appeals negates a provision of the 1961 compact "which expressly preserves riparian rights along the Delaware" (Pet., pp. 9, 11-12). We put aside the fact that the compact adopts this Court's rule of equitable apportionment, authorizing the DRBC to allocate Basin waters "in accordance with the doctrine of equitable apportion-

* (footnote cont'd. from previous page)

in that case (206 U.S. 46 [1907]) - described as "a pioneer in its field." Wyoming v. Colorado, 259 U.S. 419, 464 (1922). Thus, the Court below properly recognized a vast distinction between an upper State's unilateral allocation to itself of an interstate stream and an equitable apportionment thereof on conditions and obligations imposed by this Court. Similarly pointless is petitioners' reliance on Oregon v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371-2 (1977) for the proposition that vested property rights are "not subject to later defeasance by operation of any doctrine of federal common law" (Pet., p. 16), since petitioners had no vested property rights in New York's waters.

ment"; that it precludes any modification of the Amended Decree "except upon the consent of all the parties to said decree"; and that damages for any water project undertaken pursuant to the compact are payable solely by the Commission and not by any State or political subdivision thereof (City App., pp. 24-27; Compact, pars. 3.3, 3.4, 3.5, 14.14).

It is apparent, however, that the language of §14.19, that the compact is not intended to "affect or in any way to interfere with the law of the respective signatory parties relating to riparian rights," does not enlarge the law of any Basin State so as to endow its riparians with rights in the flow of interstate waters beyond the power of that State to confer. And as already shown, Pennsylvania law could not confer upon its riparians any rights in the

flow of New York's waters or to its share thereof as determined by this Court. The Court of Appeals did not, therefore, negate §14.19 of the compact in holding that New York's right to the share of the flow accorded it by the 1954 consent decree upon compliance with the conditions and obligations there imposed, was unaffected by §14.19 of the compact (27c).

(5)

Although the River Master's annual reports to this Court show that the City has fully complied with the release regime (Montague formula) established by this Court in its 1954 consent decree, petitioners nevertheless seek damages from the City for the inadequacy thereof in protecting the upper Delaware. As the Court of Appeals pointed out herein - New York's rejected

release plan was aimed at protecting the upper Delaware; the Pennsylvania release plan and Montague formula, successively adopted in the 1931 and 1954 Decrees, were primarily aimed at assuring major cities in Pennsylvania and New Jersey on the lower Delaware a dependable year-round supply of potable water; while objecting to New York's attempt to rearrange releases to better protect the upper Delaware, Pennsylvania advised this Court that the Basin Commission established by the compact could best resolve the matter (ante, pp. 13-16; 20c-28c). And the Basin Commission's action in redirecting releases under the Montague formula so as to protect the upper Delaware has been highly successful (ante, p. 14).

There is no denial of due process in holding petitioners bound by the release

regime consented to by Pennsylvania as in its over-all best interests, and that they must look to Pennsylvania for any modification thereof by this Court or by the Basin States through their compact.

POINT II

THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED AS TO DENIAL OF EQUAL PROTECTION.

(1)

Petitioners claim denial of equal protection, saying that the Court of Appeals' decision "denies thousands of landowners outside New York the same protections afforded New York landowners," the City being obliged to compensate New York riparians for diverting New York's share of its tributaries to the Delaware (Pet., p. 8; also pp. 4, 11; N.Y.C. Admin. Code [6 Williams 1971 ed.], §§K51-26.0, K51-44.0).

As already detailed, this Court's apportionment to New York of an equitable share of its tributaries to the Delaware imposed upon the City the obligation to provide enormous reservoir capacity sufficient to impound surplus Spring runoffs for compensating releases to the lower States, thereby assuring their citizens a dependable water supply during the dry season, as well as controlling Spring floods, and to purify the waters downstream from Port Jervis (ante, pp. 4-9). That these measures were principally directed at beneficial river regulation in behalf of the lower Basin States and subjected the City to enormous expense therefor is self-evident and was, in fact, conceded by New Jersey and Pennsylvania (ante, pp. 8-9). But even ignoring the fact that such compensating benefits

were not primarily directed at protecting riparians in New York, that State had no duty to impose the further obligation upon the City to compensate riparians in the lower Basin States who had no rights in the flow of waters in New York allotted to that State by this Court and beyond the share to which their States were thus held entitled.

In short, while New York may permit the City to preempt 100% of that State's allotted share of the flow of its tributaries to the Delaware - on condition that the City compensate New York riparians for their loss thereof and furnish their communities with an adequate water supply, presently approximating 100 mgd (N.Y.C. Admin. Code, §K51-42.0) - there is no denial of equal treatment in affording no such benefits

to communities or riparians in the lower Basin States who have no rights in New York's equitable share of its waters as apportioned by this Court.*

Finally, petitioners deem it necessary to "expose" the Court of Appeals as overly concerned with the City's fiscal crisis and the "unreasonable damage burdens" portended by their novel quest to impose damages upon it in behalf of out-of-State riparians for the share of interstate waters allotted New York (Pet., p. 15). Thus, petitioners cite a newspaper report to the effect that the

*New York "may, at will, grant, withhold, or condition the privilege to a municipality of taking water from a public source," and simultaneously reserve the right to divert such waters to other communities. Mtr. of Syracuse v. Gibbs, 283 N.Y. 275, 283, 286-7 (1940).

City's liability to "10,000 New Jersey and Pennsylvania property owners" would not likely exceed $15 million, whereas "the Court of Appeals overlooked the fact that the City sells the water that it diverts" and derives "substantial revenues" therefrom (Pet., p. 15).

Assuming the relevancy of these plainly diversionary "arguments," it is unnecessary to resort to sources de hors the record to recognize that the damages awarded by the District Court herein ($336,000) and averaging $67,000 for each of the 5 Pennsylvania riparians at the joint trial, portend a City liability of $335,000,000 ($67,000 x 5,000) - even if only half the "10,000 New Jersey and Pennsylvania property owners" be taken into account.

In stating that "the City sells the water" and derives "substantial revenues" therefrom, petitioners are quick to add "that the City's costs are not relevant" in determining profitability and consequent "liability" to compensate petitioners for rights they do not have in the flow of interstate waters apportioned to New York (Pet., p. 15). This, of course, baselessly assumes that such "rights" depend in some manner upon whether the City or a private water company owns the Croton, Catskill and Delaware systems supplying the City's water and makes a private or public "profit" therefrom. "Water rents and charges may be collected either as taxes or as compensation for water consumed." Security Bldg. & Loan Assn. v. Carey, 259 App. Div. 42, 46 (4th Dept.,

1940), affd. 286 N.Y. 646 (1941); see N.Y. Univ. v. American Book Co., 197 N.Y. 294, 297 (1910).*

Petitioners' ad hominem arguments on the "minor" cost to the City of damages

*Petitioners' Appendix (1k) lists City water revenues in each of 7 years, "As reflected in the Comptroller's Reports" - the largest such revenues being $190 million in fiscal 1974-5. The same Report for that year shows that expenses of the City's Environmental Prot. Admin. for water and water pollution control ($68,627,000) plus debt service on the plant devoted thereto ($97,877,000), totalled $166,504,000 (Annual Report of N.Y.C. Compt. for 1974-5, pp. 118-119, 483). Moreover, the original cost of the City's water supply system (land, dams, aqueducts, mains) was $1.7 billion (ibid., p. 561), and it "may earn from and out of such operation an amount equivalent to taxes" payable if the plant were privately owned, plus a "fair return on the value of the property used and useful in such public service" (Town Board v. City of Poughkeepsie, 22 AD 2d 270, 272-3 [2nd Dept., 1964]), i.e., on its current value estimated in excess of $5 billion. One must therefore resort to sheer semantics to equate even the City's highest "substantial revenues" with "profits."

to thousands of riparians in the lower Basin States, and the enormous "profitability" of its water supply system, are thus as speciously founded as their contentions on denial of due process and of equal protection.

Conclusion

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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